NO. 2040

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY, a corporation,
Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER, PAUL WESSINGER and HENRY WAGNER, Executrices and Executors, respectively of the Last Will and Testament of Henry Weinhard, Deceased,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

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OF

BRIEF ON BEHALF OF DEFENDANTS IN ERROR

In the Order in Which the Questions are Discussed.

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BRIEF OF DEFENDANTS IN ERROR.

I. Assignments and Specifications of Error By Plaintiff in Error.

Counsel for Defendants in Error, at the outset of this brief, respectfully calls to the attention of the court the fact that Specifications of Error, appearing in the brief on behalf of Plaintiff in Error (pp. 14 and 15), and the Assignments of Error, filed in the District Court (Transcript, pp. 54 to 57), do not correspond

or harmonize, either in form, substance or numbering, and for that reason it is somewhat difficult to answer connectedly the brief of Plaintiff in Error.

> "The Circuit Courts of Appeals have repeatedly called the attention of counsel to the absolute necessity of adhering strictly to the terms of rule 11, concerning 'Assignments of Errors,' and to subdivision 2 of rule 24, in relation to 'Briefs.'" * * *
>
> "The object of the rules is to so present the matter raised by the assignment of error that this court may understand what the question is it is called upon to decide without going beyond the assignment itself, and also that the party excepting may be confined to the objection taken at the time, which must then have been stated specifically." * * *
>
> *Walton v. Wild Goose Mining & Trading Co.*, (C. C. A. 9th Cir.) 123 Fed. 209, 210.
>
> *Migeon v. Montana C. R. Co.*, 77 Fed. 249.

II. Statement of Facts.

It is believed advisable to detail briefly the facts, since the statement of facts contained in the brief of Plaintiff in Error, consisting of some ten pages, contains so much extraneous matter, much of it off record, and the correctness of which the Defendants in Error are not prepared to accept, that it may be difficult for this court to cull conveniently the essential facts therefrom.

The plaintiff below, which for convenience will be denominated the Weinhard Estate, brought an action to recover against the defendant, The R. R. Thompson Estate Company, upon a promissory note executed by the Multnomah Hotel Company, a corporation, I. Gevurtz & Sons, a corporation, and Philip Gevurtz, of which the hotel company was the principal and the other two parties were accommodation makers. Philip Gevurtz was president of I. Gevurtz & Sons and of the Multnomah Hotel Company.

At the time of the making of the note, The R. R. Thompson Estate Company was the owner of the Multnomah Hotel property in Portland, Oregon, and the Multnomah Hotel Company was the lessee of the hotel from it. I. Gevurtz & Sons were the owners of practically all of the common and preferred stock of the hotel company.

Thereafter, in January, 1913, I. Gevurtz & Sons and the hotel company became financially embarrassed, and The R. R. Thompson Estate Company, in order to protect its property, obtained from I. Gevurtz & Sons an option, dated January 10, 1913, whereby I. Gevurtz & Sons agreed that The R. R. Thompson Estate Company should have the right to purchase all the capital stock of the hotel company for $175,000, said sum to be applied by The R. R. Thompson Estate Company to the payment of the debts of the Multnomah Hotel Company, and all the debts in excess of that amount to be discharged immediately by I. Gevurtz & Sons, but upon their inability so to do, The R. R. Thompson Estate Company should advance to I. Gevurtz & Sons $35,000 upon I. Gevurtz & Sons giving to The R. R. Thompson Estate Company their note in that amount, and should disburse such sum to the creditors of the hotel company; and I. Gevurtz & Sons

were further required to give to The R. R. Thompson Estate Company its Contract of Indemnity against the payment of debts and liabilities of the Multnomah Hotel Company in excess of $210,000 ($175,000 plus $35,000).

The transaction was speedily consummated upon the terms set forth in this option, and there was delivered to The R. R. Thompson Estate Company the capital stock and the note and Contract of Indemnity referred to, and it took possession of the stock and hotel properties.

Soon thereafter I. Gevurtz & Sons were adjudged bankrupt, and on the 29th day of May, 1913, The R. R. Thompson Estate Company presented its Proof of Claim against the estate of the bankrupt in that proceeding, basing its demand upon the promissory note of $35,000, and the Contract of Indemnity of I. Gevurtz & Sons, and setting forth the liabilities of the Multnomah Hotel Company which it was claimed that they had paid or assumed, and among the liabilities so claimed to have been assumed was that of the Weinhard Estate upon the note here sued upon.

Subsequently an amended Proof of Claim was filed by The R. R. Thompson Estate Company, setting forth the same facts, but enlarging thereon somewhat. From the language of this Proof of Claim and the decision of the referee it is presumed that the amended Proof of Claim was filed by agreement between counsel for trustee and The R. R. Thompson Estate Company after the decision of the referee was verbally rendered. However, the amended Proof of Claim and the original Proof of Claim, so far as this proceeding is concerned, present no new or different question. (This is here stated, since from the language of counsel for Plaintiff in Error on

page 10 of its brief, it might be inferred by the court—although it is assumed that counsel did not intend it to be thus inferred—that the amended Proof of Claim modified the former position of The R. R. Thompson Estate Company so far as the questions here involved are considered.)

The trustee in bankruptcy in that proceeding contested the claim, and The R. R. Thompson Estate Company maintained the position that its claim was allowable. The referee, after a hearing, allowed the claim in the full amount asked (excepting some $2900.00 which had been stipulated between the attorneys should not be allowed, and which has no bearing on the issues in this case).

Thereafter a dividend was declared, and The R. R. Thompson Estate Company recieved the sum of $13,-237.88, or 23% of the amount claimed, which amount included, of course, a dividend upon the amount of the note here sued upon, and they are still entitled to receive such further dividends in the estate as are declared from time to time.

III. Contentions of Plaintiff in Error.

The contentions of Plaintiff in Error, made in the lower court and also made here, are:

First. That the R. R. Thompson Estate Company did not assume the indebtedness of the Multnomah Hotel Company in excess of $175,000, and that it did not assume the debt due the Weinhard Estate.

Second. That even though it did assume the in-

debtedness of the Multnomah Hotel Company, including the debt due the Weinhard Estate, the Weinhard Estate could not recover in a suit against it, since it was a third or outside party to the transaction, and

Third. That even though such suit was maintainable, the contract was not in writing and was therefore not enforceable by reason of the statute of frauds.

(Another contention was made in the pleadings by the defendant below, The R. R. Thompson Estate Company, namely, that the note, which is the subject of this suit, was signed only by the president of the Multnomah Hotel Company, and that the by-laws of the Multnomah Hotel Company provided that it should be signed by both the president and the treasurer, to which a reply was interposed to the effect that the Multnomah Hotel Company, having received the consideration therefor, to-wit: $4500, it was estopped from setting up the want of authority. This contention, however, the Plaintiff in Error waived at the trial).

IV. Position of Defendants in Error.

The position of the Defendants in Error is:

First. That The R. R. Thompson Estate Company did assume the indebtedness of the Multnomah Hotel Company, including that of plaintiff's.

Second. That it received a valuable consideration for the assumption from the original party to the transaction, to-wit: the capital stock of the Multnomah Hotel Company, which carried with it the assets of the

hotel company, free of indebtedness, the note of $35,000 and the Contract of Indemnity.

Third. That a suit under such circumstances is maintainable by the Weinhard Estate against the R. R. Thompson Estate Company, and

Fourth. That such transaction is without the statute of frauds, and that there were written memoranda of the assumption signed by the party to be charged.

Fifth. That, moreover, the debts of the Multnomah Hotel, according to the contention of Plaintiff in Error made before the Court of Bankruptcy, did not exceed $175,000.

At the trial of the cause in the District Court, a jury was waived. After hearing the evidence of plaintiff below, *the defendant introducing no evidence whatever,* the court found generally in favor of the plaintiffs, and refused in its discretion to make special findings tendered by the defendant below, which refusal to make the special findings tendered, defendant duly objected to, and the exceptions were allowed.

V. Points of Law.

For the purpose of convenience, a summary statement of the law applicable to the questions involved herein, will be stated, with the citation of authorities substantiating them.

I.

ON A TRIAL OF AN ACTION AT LAW, WITHOUT THE INTERVENTION OF A JURY, UNDER REV. STAT. SEC. 649, IT IS DISCRETIONARY WITH THE COURT TO MAKE EITHER GENERAL OR SPECIAL FINDINGS; AND THE EXERCISE OF THIS DISCRETION IS NOT THE SUBJECT OF REVIEW.

School Dist. No. 11 v. Chapman (C. C. A. 8th Cir.), 152 Fed. 887, 895; 205 U. S. 545; 51 L. Ed. 932; 27 Sup. Ct. 792 (certiorari denied).

State Bank v. Smith (C. C. A. 5th Cir.), 94 Fed. 605, 608.

Mercantile Ins. Co. v. Folsom, 18 Wall. 237, 238; 21 L. Ed. 827, 832.

II.

WHEN A JURY IS WAIVED AND THE CAUSE IS TRIED BY THE COURT, THE GENERAL FINDINGS OF THE COURT FOR ONE OR THE OTHER OF THE PARTIES, STAND AS A VERDICT OF A JURY AND MAY NOT BE REVIEWED IN AN APPELLATE COURT, UNLESS THERE IS ABSENCE OF SUBSTANTIAL EVIDENCE TO SUSTAIN IT, AND THEN ONLY UPON PROPER MOTION BEFORE THE TRIAL COURT.

Pennsylvania Casualty Co. v. Whiteway (C. C. A. 9th Cir.), 210 Fed. 782, 784.

Martinton v. Fairbanks, 112 U. S. 670; 5 Sup. Ct. 321; 28 L. Ed. 862.

Boardman v. Toffey, 117 U. S. 271, 6 Sup. Ct. 734; 29 L. Ed. 898.

Dunsmuir v. Scott, 217 Fed. 200, 202 (C. C. A. 9th Cir.).

Sierra Land & Live Stock Co. v. Desert Power & P. Co. (C. C. A. 9th Cir.), 229 Fed. 982.

Lehnen v. Dickson, 148 U. S. 71; 13 Sup. Ct. 481; 37 L. Ed. 373.

Buetell v. Magone, 157 U. S. 154; 58 Sup. Ct. 566; 39 L. Ed. 654, 655.

National Surety Co. v. Cincinnati etc. Ry. Co., (C. C. A. 6th Cir.), 145 Fed. 34, 35.

Delaware L. & W. R. Co. v. Rutter, et al, 147 Fed. 51.

Delaware L. & W. R. Co. v. Kutter, et al, 147 776; 203 U. S. 588; 51 L. Ed. 330 denying writ of certiorari in above case.

III.

THE RIGHT OF A THIRD PERSON TO MAINTAIN ASSUMPSIT UPON A CONTRACT, THE PERFORMANCE OF WHICH WILL INURE TO HIS BENEFIT, BUT TO WHICH HE IS NOT A PARTY, IS THE PREVAILING RULE IN THIS COUNTRY AND THE SETTLED LAW OF OREGON.

or otherwise stated

WHERE ONE PERSON PROMISES ANOTHER FOR A CONSIDERATION MOVING FROM HIM, TO PAY OR DISCHARGE SOME LEGAL OBLIGATION OR DEBT DUE FROM SUCH OTHER TO A THIRD PERSON, THE LATTER, ALTHOUGH A STRANGER TO THE CONTRACT, MAY MAINTAIN AN ACTION THEREON.

Hendricks v. Lindsey, 93 U. S. 143; 23 L. Ed. 855, 857.

Union Life Ins. Co. v. Hanford, 143 U. S. 187; 36 L. Ed. 118, 120.

Feldman v. McGuire, 34 Or. 309; 55 Pac. 872.

Oregon Mill Co. v. Kirkpatrick, 66 Or. 21, 24; 133 Pac. 69.

Baker City M. Co. v. Idaho C. P. T. Co., 67 Or. 372, 377; 136 Pac. 23.

Miles v. Bowers, 49 Or. 429, 434; 90 Pac. 905.

Washburn v. Investment Co., 26 Or. 436.

Baker v. Eglin, 11 Or. 333; 8 Pac. 280.

Hughes v. Ore. R. & N. Co., 11 Or. 437; 5 Pac. 206.

Schneider v. White, 12 Or. 503; 8 Pac. 652.

Strong v. Kann, 13 Or. 172.

Chrisman v. State Ins. Co., 16 Or. 283; 18 Pac. 860.

Rea v. Barker (Cir. Ct. Ore.), 135 Fed. 890.

Lord's Oregon Laws, Sec. 27.

III (a).

OF COURSE THE CONTRACT MUST BE EXECUTED AND NOT EXECUTORY.

Second Natl. Bank v. Grand Lodge, 98 U. S. 123.

Pope v. Porter, 33 Fed. 79.

In re Halstead Co., 204 Fed. 115, 118.

Washburn v. Investment Co., 26 Or. 436, 442-443.

Brower Lbr. Co. v. Miller, 28 Or. 565, 572; 43 Pac. 659.

III (b).

AND THE CONTRACT MUST BE MADE DIRECTLY AND PRIMARILY FOR THE BENEFIT OF THE THIRD PARTY.

Parker v. Jeffrey, 26 Or. 186, 191; 37 Pac. 712.

Washburn v. Investment Co., 26 Or. 436, 441; 36 Pac. 532; 38 Pac. 621.

Feldman v. McGuire, 34 Or. 309.

Baker City M. Co. v. Idaho C. P. Co., 67 Or. 372, 377.

Brower Lbr. Co. v. Miller, 28 Or. 565, 572; 43 Pac. 659.

Barker v. Pullman Co., 124 Fed. 555, 566-8.

Gibson v. Victor Talking Mach. Co., 232 Fed. 225, 232.

Oregon Mill Co. v. Kirkpatrick, 66 Or. 21, 24.

Sayward v. Dexter-Horton Co. (C. C. A. 9th Cir.), 72 Fed. 758, 765.

Moore v. Ouray First Natl. Bank (Col.), 10 L. R. A. (N. S.) 260, 263.

Jenkins v. Chesapeake & O. R. Co., 49 L. R. A. (N. S.) 1166, 1179.

IV.

WHERE ONE HAS PURCHASED PROPERTY OF A DEBTOR AND IN CONSIDERATION FOR THE PURCHASE HAS ASSUMED THE DEBT DUE TO A THIRD PERSON, THE OBLIGATION OF THE PURCHASER TO THE THIRD PERSON IS NOT WITHIN THE STATUTE OF FRAUDS.

Strong v. Kann, 13 Or. 172.

Feldman v. McGuire, 34 Or. 309, 312.

Kiernan v. Kratz, 42 Or. 474, 478; 69 Pac. 1027.

Miller v. Beck, 72 Or. 141, 147; 142 Pac. 603.

IV (a).

THE MEMORANDUM REQUIRED BY THE STATUTE OF FRAUDS IS NOT REQUIRED TO BE IN ANY PARTICULAR FORM NOR TO CONTAIN APT WORDS OF CONTRACT. IT MAY BE MADE AFTER THE ACTUAL CONTRACT WAS ENTERED INTO AND WITH A PURPOSE ENTIRELY OTHER THAN TO EVIDENCE THE AGREEMENT.

Fisk v. Henarie, 13 Or. 156, 171.

St. Louis Ry. Co. v. Beidler, 45 Ark. 17.

Spangler v. Danforth, 65 Ill. 152.

V.

UNDER A RULE OF THE CIRCUIT COURT, REQUIRING THAT ASSIGNMENTS OF ERROR SHALL SET OUT SEPARATELY AND PARTICULARLY EVERY ERROR ASSERTED AND INTENDED TO BE URGED, THE MERE GENERAL ASSIGNMENT THAT JUDG-

MENT WAS RENDERED FOR THE WRONG PARTY IS NOT A COMPLIANCE WITH THE RULE, AND IN THE ABSENCE OF PLAIN ERROR IN THE RECORD WILL BE DISREGARDED.

Deering Harvester Co. v. Kelly (C. C. A. 6th Cir.), 103 Fed. 261, 264.

VI.

WHERE NO REASON OR GROUND IS ASSIGNED FOR OBJECTION TO EVIDENCE AND NONE IS SO MANIFEST THAT THE TRIAL COURT COULD NOT FAIL TO UNDERSTAND IT, THE OBJECTION IS PROPERLY OVERRULED.

Deering Harvester Co. v. Kelly (C. C. A. 6th Cir.), 103 Fed. 261, 264.

Migeon v. Montana C. R. Co. (C. C. A. 9th Cir.), 77 Fed. 249, 252.

VI. Argument.

As heretofore intimated, the discussion of the questions before this court for review is so commingled by Plaintiff in Error in its brief, that in order to discuss them clearly it is first necessary to segregate them from the jumbled mass. We have attempted fairly to do this under the head of "Contentions of Plaintiff in Error," and in the discussion following shall adhere to the classification there made.

Proceeding then to the discussion, let us consider the *First Contention* that there was no assumption of

the indebtedness of the Multnomah Hotel Company in excess of $175,000.

(a) Evidence of Assumption of Indebtedness by the R. R. Thompson Estate Co.

The consideration of this question involves two phases—(1) *Was there an assumption of the entire indebtedness,* and (2) the assumption of $175,000 of indebtedness being conceded: *Was the indebtedness of the Multnomah Hotel Company in excess of $175,000?*

(1) Was There an Assumption of the Entire Indebtedness?

The District Court *found generally* in favor of the Weinhard Estate, plaintiffs below, and *refused to make special findings,* and as has been set forth under Legal Point I, the ruling so to find, and the refusal to find specially, was a proper exercise of judicial discretion and in this regard is not subject to review in the appellate court.

The correctness of the general finding in favor of the Weinhard Estate, plaintiffs below, has every presumption in its favor here. *It stands as the verdict of a jury, and will not be reviewed unless there is a total absence of substantial evidence to sustain it.* This court has lately passed upon this question, and other authorities are set forth under Legal Point II.

In the case of *Pennsylvania Casualty Co. v. White-*

way (C. C. A. 9th Cir.), 210 Fed. 782, 784, Circuit Judge Gilbert said:

> "When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the court. When a jury is waived, and the cause is tried by the court, the general finding of the court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the court the issue of law so involved, before the close of the trial."

Assuming, therefore, that appropriate motion was made by the defendant below, it will be seen that if there be any substantial evidence of the assumption of all the indebtedness of the Multnomah Hotel Company by The R. R. Thompson Estate Company, this fact will not be reviewed.

What evidence, therefore, was there of an assumption of the indebtedness? In this connection, the court's attention is called to the

(A) Proofs of Claim in Bankruptcy.

It will be recalled that proofs of claim were filed by The R. R. Thompson Estate Company—an original

proof and an amended proof (Transcript, pp. 77-81, and 81-118), with the Referee in Bankruptcy in the Estate of I. Gevurtz & Sons, bankrupt, against said estate, claiming as due to it some $60,000 by reason of the debts of the Multnomah Hotel Company paid and assumed. Amongst the debts paid or assumed making up this claim of approximately $60,000 was the debt of the Weinhard Estate, based on the note sued upon (Transcript, p. 93). It is true this claim was not asserted to have been paid; in fact, it was asserted to have not been paid, but all the more, it was claimed to have been assumed or it would have had no place in the Proofs of Claim, upon which dividends were demanded and received by the Thompson Estate.

In the brief of Plaintiff in Error (pp. 22, 23), capital is endeavored to be made by it out of the fact that "a detailed statement of all claims, liabilities and demands due and owing from the Multnomah Hotel Company and *assumed and agreed to be paid by said bankrupt*" is attached to the Proof of Claim (Transcript, pp. 79 and 84), and it is argued from this by Plaintiff in Error in its brief, that, since the statement shows the account of the Weinhard Estate to consist of two notes for $1500 and $4500, respectively, this establishes the fact that Plaintiff in Error did not assume or agree to pay the Weinhard Estate claim.

It is impossible to follow this reasoning. It is assumed that what was intended was that, since the statement showed that these notes were not then paid by The R. R. Thompson Estate Company, there was no claim asserted for the repayment of that amount.

A list of claims was filed, which *were assumed and agreed to be paid.* There is set forth in this list numerous claims paid, some by direct payment, some by notes

(Transcript, p. 93) and still another by taking over of a contract, or executing a new one (Transcript p. 94), and others are set forth under Trade Accounts Payable (Transcript, p. 89), under Sundry Accounts Payable (Transcript, p. 89), and under Bills Payable & Interest (Transcript, p. 89 and pp. 92-94) as not paid, and among the latter class that of the Weinhard Estate and of the National Cash Register Company, the latter two claims amounting to $6910.25. In other words, the detailed statement upon which the Proof of Claim was based, sets forth two classifications, namely, claims paid either in cash or otherwise and claims assumed, but not then paid, and that this interpretation was placed upon it, both by The R. R. Thompson Estate Company and by the Referee in Bankruptcy, is most positively shown by the fact that dividends were allowed to The R. R. Thompson Estate Company upon the debts assumed but not paid by it, as well as upon the debts paid by it, and dividends were thus accordingly received by The R. R. Thompson Estate Company.

The form in which the statement appears in the Transcript (pp. 89 and 90) is not particularly conducive to clearness, due to the fact that the statement is extended over several pages, and the eye does not follow it as it would on the original statement were it set forth on one page. The fact is, however, as will be seen from a close examination of this statement, that the total liabilities of the Multnomah Hotel Company at the date of the purchase by The R. R. Thompson Estate Company were $243,912.62 (Transcript, p. 90) from which is deducted the sum of $9473.20, the amounts collected by The R. R. Thompson Estate Company from accounts receivable by the Multnomah Hotel Company at the time The R. R. Thompson Estate Company took over the stock and assets, as set forth in

Exhibits "E" and "F" (Transcript, p. 95), leaving a net sum paid and assumed of $234,439.42. From this amount is deducted $175,000 paid by The R. R. Thompson Estate Company at the time of the transfer, leaving a balance of $59,439.42, plus interest charged thereon of $1050.00, or $60,489.42, the amount for which the Proof of Claim was filed and allowed, less a stipulated deduction, having nothing to do with the issues in question.

The total liabilities of the Multnomah Hotel Company, as set forth on page 90 of the Transcript, are made up of (A) Accrued Wages, (B) Accounts Payable, (C) Sundry Accounts Payable and (D) Bills Payable and Interest; and under the latter classfication of Bills Payable and Interest is included the account of the Weinhard Estate. These items total *$243,912.62*; and there is shown a balance due on said Trade Accounts Payable of $291.80; on Sundry Accounts $2240.11 and on Bills Payable and Interest of $6910.25, totaling a balance due of $9442.16, and an amount paid of $234,407.46, these two sums ($234,-407.46 and $9442.16) being *$243,912.62*, the amount of the alleged Total Indebtedness. But it will be noted that there was not deducted from the claim filed the balance due and unpaid upon any of these accounts payable or bills payable, and the only deduction made by The R. R. Thompson Estate Company in its Proof of Claim from the said total indebtedness of $243,912.62 was the sum of $9473.20, collected by it from accounts due to the Multnomah Hotel Company (which accounts, in fact, according to the agreement between the parties, should have been applied on the note, and interest to that extent should not have been allowed thereon, although this has no bearing on the issues in question).

Again, a conclusive and most striking evidence of

the fact that there was an assumption of the entire indebtedness is seen in the following: From the Minutes of Meeting of I. Gevurtz & Sons (Exhibit "J" attached to the Proof of Claim), it will be noted that the directors of I. Gevurtz & Sons were Philip Gevurtz, Alex. Gevurtz, Matthew Gevurtz, Louis Gevurtz and I. Gevurtz (Exhibit "J," Transcript, p. 103). In the original Proof of Claim filed (pp. 80, 81, Transcript) and in the Amended Proof filed (pp. 84 and 85, Transcript), it is set forth that in addition to the liabilities exhibited and shown by the various exhibits attached to said Proof of Claim, there appeared on the original books of the Multnomah Hotel Company claims in favor of Philip Gevurtz in the sum of some $4,000, Alex Gevurtz in the sum of some $1300, and Louis Gevurtz in the sum of some $1300, aggregating the sum of $....., and that these parties *"have never claimed or demanded said sums* from either the Multnomah Hotel Company or *The R. R. Thompson Estate Company,* and from the nature of the accounts it might appear that they, or either of them may have a claim against I. Gevurtz & Sons therefor, but that each of said Philip Gevurtz, Alex. Gevurtz and Louis Gevurtz are *estopped from claiming or collecting said demands or accounts from the The R. R. Thompson Estate Company* (italics ours) or the Multnomah Hotel Company, each of them having been directors of I. Gevurtz & Sons at the time of the adoption of the resolutions by I. Gevurtz & Sons ratifying the sale * * * and are estopped by their actions as directors of I. Gevurtz & Sons, and in accepting I. Gevurtz & Sons as liable for said claims *from collecting the same from The R. R. Thompson Estate Company* or the Multnomah Hotel Company." (Italics ours.)

The same language appears in the amended proof

of claim (Transcript, pp. 84, 85), and further in the amended proof of claim filed and which was allowed, of course, in the bankruptcy proceedings as heretofore stated, the following language occurs (see pp. 87 and 88, Transcript), *"That I. Gevurtz & Sons, bankrupt, in assuming the responsibility of The R. R. Thompson Estate Company for the indebtedness of the Multnomah Hotel Company,* (Italics ours) and in guaranteeing the same really and in truth and in fact did not increase its indebtedness or liability, as it was in fact already liable and responsible for all of said indebtedness."

The solicitude of The R. R. Thompson Estate Company, upon filing this claim in bankruptcy, to have it understood that the Gevurtz's, individually, were estopped from asserting a claim against them by reason of accepting the Gevurtz corporation as liable therefor, and by said Gevurtz corporation *"assuming the responsibility of The R. R. Thompson Estate Company for the indebtedness of the Multnomah Hotel Company"* shows conclusively and beyond contradiction that the *responsibility of The R. R. Thompson Estate Company for the indebtedness of the Multnomah Hotel Company* was recognized by them, else why have I. Gevurtz & Sons assumed *the responsibility of The R. R. Thompson Estate Company?*

If the language of these proofs do not positively, definitely and unequivocally state an assumption of liability for all of the indebtedness, and an admission of responsibility for the same by The R. R. Thompson Estate Company, it is hard to conceive any language that would do so. In fact, it is hard to conceive how one could so stultify one's self in claiming, after having gone on record in such manner, *and after having received dividends by reason of such record,* that there was no assumption.

Moreover, the motive for such an assumption is evident. It was stated in the minutes of meeting of I. Gevurtz & Sons, filed with the claim in bankruptcy as "Exhibit J" (Transcript, p. 109), and in the option filed as "Exhibit G" with said claim (Transcript, pp. 97-8), and was cogently adverted to by the District Judge (Transcript, pp. 35-36). Said Judge Wolverton:

> "But, considering the manner in which the transactions were handled, it is manifest that there was an assumption of the entire indebtedness of the Hotel Company. The purpose of the defendant company, and such was the intendment of the agreement of the parties, was to obtain the stock without impairment of its value because of any impending liabilities of the Hotel Company, and when the note of $35,000 was given, the defendant company retained in its possession the fund arising therefrom, and disbursed it in payment of the creditors of the Hotel Company. None of it was paid directly to I. Gevurtz & Sons. And as to the indemnity, it operated to reimburse the defendant company in the payment of any liabilities of the Hotel Company beyond the aforesaid amount of $175,000 plus the $35,000 disbursed by the defendant company. I am impressed that these transactions import by implication an assumption on the part of the defendant company of the liabilities of the Hotel Company, not only up to the amount of $175,000, but also of all its liabilities beyond that amount."

(b) Brief of the R. R. Thompson Estate Company in Support of Claim.

Still further evidence of assumption is shown by the Brief filed with the Referee in Bankruptcy. In this brief filed by The R. R. Thompson Estate Company in substantiation of the claim (Transcript, p. 116), one of the two positions taken throughout the brief (the other position will be referred to hereafter) was that the debts of Multnomah Hotel Company, as set forth in said claim, had been paid by it, and that I. Gevurtz & Sons had received and retained the fruits and consideration of these payments to creditors (Transcript, pp. 121, 122); and the court's attention is again called to the fact that *amongst the debts upon which the claim was based, for which The R. R. Thompson Estate Company admitted liability, was that of the Weinhard Estate.*

(c) Referee's Order Allowing Claim.

The Order of the Referee (Transcript, pp. 127-9), allowing the claim of The R. R. Thompson Estate Company, filed in the bankruptcy proceedings, incorporates therein the reason for allowing the claim, which reason is specifically stated, that The R. R. Thompson Estate Company agreed to pay the outstanding accounts *"under an agreement with I. Gevurtz & Sons, duly executed, whereby, in addition to said $35,000 covered by note in question, they would also pay additional bona fide claims that might be outstanding against said hotel, the exact amount of which could not at that time be fixed,"* and

that in pursuance of said agreement accounts were paid to the extent of some $60,000, and *"for the return of these advances the claim is made and filed."* (In this connection the court's attention should be called to the fact that in the brief of The R. R. Thompson Estate Company filed in the bankruptcy proceedings, and in the order allowing the claim in said proceedings, the entire debts set forth in the proof of claim are referred to as having been paid. It is assumed that by this expression was meant that they had been paid by assumption, and the fact is, for example, some $100,000 which was to be paid to the First National Bank of Portland, Oregon, was not actually paid, but a note of The R. R. Thompson Estate Company given therefor (Transcript, p. 93); and the claim of M. Seller & Company, to the extent of $10,000 was also paid by note of the Multnomah Hotel Company (Transcript, p. 93); and the claim of Graves Music Company (Transcript, p. 94) was paid by new contract, and so it is assumed that the claim of the Weinhard Estate was paid by the assumption of liability. At any rate, the total amount of the indebtedness is referred to in the brief of counsel and in the order, as having been paid, and The R. R. Thompson Estate Company cannot now object to that construction after having received the benefits thereof.) This phase, however, has already been adverted to.

(d) Dividends Received.

Upon the allowance of the claim filed by The R. R. Thompson Estate Company, which claim included, as heretofore stated, the indebtedness due the Weinhard Estate upon its note here sued upon, *The R. R. Thomp-*

son Estate Company received and accepted the sum of $13,237.88 in dividends. (Transcript, p. 130), a proper proportion of which was based upon the payment or assumption of the indebtedness due the Weinhard Estate.

It is therefore confidently asserted that not only was there *some evidence of assumption* of the debts of the Multnomah Hotel Company, *but that the evidence thereof was overwhelming;* that not only was the District Court justified in coming to the determination that there was assumption, but any other determination would have been impossible.

Counsel in his brief (p. 8) refers to a paragraph contained in the option of I. Gevurtz & Sons, which states that the advancing of the $35,000 upon the Gevurtz & Sons note shall not be in acknowledgment of any assumption by the said The R. R. Thompson Estate Company of any further liabilities, nor for the payment of any greater sum for the assets of the Multnomah Hotel Company than represented by the purchase price of the common and preferred stock. The fact is, however, that it was not at the time of the making of the option that the contract of assumption occurred. The option was not the contract. It was upon the taking over of the capital stock and assets of the Multnomah Hotel Company by The R. R. Thompson Estate Company and the delivery to it of the Contract of Indemnity that the contract was *executed* and the agreement consummated. At that time there was an assumption of the indebtedness, and as evidence of that assumption, the court properly took into consideration the condition of the parties at that time, their reason for assumption, if any, and the filing of the proof of claim

thereafter, the language thereof admitting the assumption, and the accepting of the dividends upon the allowance of the claim, which could only have been *honestly* accepted upon the presumption of such assumption.

2. Was the Indebtedness of Multnomah Hotel Company in Excess of $175,000?

The court, in finding its general verdict in favor of the plaintiff below, could also have reached the conclusion that the debts of the Multnomah Hotel Company did not exceed $175,000, and if it so concluded, the judgment was proper, even though it should have determined that The R. R. Thompson Estate Company did not assume *all* of the debts of the Multnomah Hotel Company. This was purely a question of fact.

There was such evidence. In the bankruptcy cause of I. Gevurtz & Sons, wherein was filed the claim of The R. R. Thompson Estate Company for the sum of approximately $60,000, the trustee in bankruptcy therein objected to the claim, and vigorously contested it, upon the ground, among others, "that I. Gevurtz & Sons had no corporate authority under its charter to guarantee the payment of the obligation of the Multnomah Hotel Company" nor "to execute the contract in question guaranteeing the repayment to The R. R. Thompson Estate Company of bills against the Multnomah Hotel Company, agreed to be handled by said estate company" (Order of Referee, Transcript, p. 129).

Whereupon The R. R. Thompson Estate Company filed a brief in support of its claim with the Bankruptcy

Court, arguing and insisting that $143,000 included in the payments shown in its Proofs of Claim, paid to the First National Bank by it was *not a debt* for which the Multnomah Hotel Company was liable (Transcript, pp. 120-121 and p. 125). On page 121 it is said:

"The note given to the bank (for $143,000) *was a direct obligation of I. Gevurtz & Sons and one for which the Multnomah Hotel Company was not liable, except that it indirectly obtained the benefit of it, but had paid fully for it by the issue of the capital stock to I. Gevurtz & Sons."*

Again, in said brief (Transcript, p. 125), counsel for The R. R. Thompson Estate Company, in insisting upon the allowance of the claim, urges:

"In fact, it is a serious question in our minds whether the bank could have held the Multnomah Hotel Company on these notes (notes of $143,000) inasmuch as they were purely accommodation makers without any consideration whatever."

This argument, then made by The R. R. Thompson Estate Company, was insisted upon for the purpose of showing that the debts of the Multnomah Hotel Company at any rate were $143,000 less than now claimed, and that even though the contract of indemnity was void or invalid, the $143,000 was paid in liquidation of the debts of the bankrupt, and should therefore be repaid by them, less proper credit.

This brief was introduced in evidence in the court below by the Weinhard Estate as an admission of the parties against interest, and it is claimed that this admission was sufficient evidence upon which to conclude that the debts did not exceed $175,000, and that, therefore, The R. R. Thompson Estate Company was

liable to the Weinhard Estate since its debt was, unlike that claimed by and paid to the First National Bank, a debt of the Multnomah Hotel Company.

A similar situation occurred in the case of *Feldman v. McGuire,* 34 Or. 309, opinion by Wolverton, C. J., (then a member of the Oregon Supreme Court). There, there was introduced in evidence answers filed in another suit, which set forth certain indebtednesses. The court there said:

> "These answers of defendant, being against his interest, and he being a party to the action, were admissible to establish plaintiff's cause. * * *
>
> "In short, the effort was to prove that defendant (McGuire) had assumed and agreed to pay all of Nicolai's indebtedness, and that all of such legitimate indebtedness did not exceed $30,000, and, therefore, that the defendant had agreed to pay the plaintiff's claim or demand against Nicolai. The agreement, if one existed, to pay all of such indebtedness, was known only to defendant and Nicolai, whose interests were adverse to plaintiff's in the present action, and hence resort was had to indirect testimony to establish the agreement. When properly understood, we think the exhibits were competent, and taken in connection with the testimony of the defendant, had some tendency to establish plaintiff's case, and were therefore properly admitted."

If, therefore, we are correct in our position that there was some substantial evidence upon which the court could have found that the indebtedness did not exceed $175,000, then no matter how incorrect our other positions may be, the District Court should be affirmed,

since it is conceded that The R. R. Thompson Estate Company was responsible for the proper application of $175,000, at least, to the payment of *creditors* of the Multnomah Hotel Company, and as shown, they have insisted—*when and where it was to their interest to insist*—that $143,000 of the money applied by them was applied to the payment of a debt which was really not a debt of the Multnomah Hotel Company.

The next point to be discussed, as heretofore outlined, is the *Second Contention* of Plaintiff in Error—that even though it did assume the entire indebtedness of the Multnomah Hotel Company, including the debt due the Weinhard Estate, the Weinhard Estate could not recover in a suit against it, since it was not a party to the contract. This brings us to the consideration of the much mooted question:

B. Can a Third Person, for Whose Benefit a Promise or Contract is Made Between Two Others, Sue Thereon in His Own Name?

As stated in a note to one of the cases cited by Plaintiff in Error in its Brief, namely, *Linneman v. Morass*, 98 Mich. 178; 39 Am. St. Rep. 538, 532 (Note): "The general rule supported by the weight of authority is that a third person, for whose benefit a promise or contract is made between two others, may sue thereon in his own name, whether the contract is parole or written, and though it is made or entered into without his

knowledge and no consideration moves from him," citing, as upholding this doctrine, cases decided by the courts of New York, Wisconsin, Nevada, California, *Oregon,* Ohio, Kansas, Missouri, Mississippi, Kentucky, Indiana, Texas, Illinois, Nebraska, North Carolina, Colorado, Minnesota and Iowa, and of the United States, including the Supreme Court of the United States.

Section 27, Lord's Oregon Laws, provides as follows:

> "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section 29, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

and under this section the Oregon cases have universally upheld the enunciated doctrine where the facts justify it.

It is freely admitted that there are many limitations to this rule. As stated in the Points of Law, there are certain requisites which are essential before this rule may be applied in its widest sense. These requisites are stated under Points 3-A and 3-B. However, it is not deemed necessary, at this stage, to do more than to call to the attention of the court the cases of *Hendricks v. Lindsey*, 93 U. S. 143; *23 L. Ed.,* p. 855, 857, where it is said:

> "But the right of a third party to maintain assumpsit on a promise not under seal made to another for his benefit, although much con-

troverted, is now the prevailing rule in this country,"

and *Union Life Ins. Co. v. Hanford,* 143 U. S. 187; *36 L. Ed.,* 118, and to the leading Oregon decisions of *Feldman v. McGuire,* 34 Or. 309 (55 Pac. 872); *Washburn v. Investment Co.,* 26 Or. 436; *Miles v. Bowers,* 49 Or. 429, 434; *Oregon Mill Co. v. Kirkpatrick,* 66 Or. 21, 24 (133 Pac. 69); *Baker City M. Co. v. Idaho C. P. T. Co.,* 67 Or. 372, 377, since it is *universally accepted* that where one has purchased property of a debtor and in consideration of the purchase has assumed the debt due to a third person, holding the property as a consideration for the assumption, the third person may maintain a suit thereon in his own name and the promisor is liable thereunder.

It is admitted, throughout the brief of counsel, that where a person has received from another some *fund, property* or *thing* in consideration of which he has made a promise or entered into an undertaking with such other, but directly and primarily for the benefit of a third, such third person may maintain an action directly upon such promise or undertaking so made and entered into for his benefiit, although not a party to the transaction. This is the language of the Oregon cases and many of the other cases, cited under the Points of Law.

That, in this case, The R. R. Thompson Estate Company received the stock and assets of the Multnomah Hotel Company, is undisputed; it was found by the Referee upon the allowance of the claim of The R. R. Thompson Estate Company in the bankruptcy proceeding of I. Gevurtz & Sons (Transcript, p. 128); it was so admitted in the Brief of The R. R. Thompson Estate Company filed in said proceedings (Transcript,

p. 119); it was set forth in the proofs of claim (Transcript, pp. 79 and 83), and in the exhibits attached thereto (Transcript, pp. 96, 97-8, pp. 103-113); in fact, not only did they receive the stock and assets of the Multnomah Hotel Company, *but they also received, accepted and hold, dividends in the bankruptcy proceedings, which otherwise would have belonged and could have been claimed by the Weinhard Estate.* Under such circumstances, it seems folly and useless to go into a lengthy discussion of the cases and counsel for Defendants in Error shall not attempt to do so. Cases have been cited in Points of Law, and the time of this court will not be taken up further in that regard, except in due time to discuss the cases cited in the Brief of Counsel for Plaintiff in Error on page 21 of its Brief.

We now come to a discussion of the *Third Contention* of Plaintiff in Error, namely, that the action is not maintainable, since though the contract of assumption were made, under Section 808, Lord's Oregon Laws, subdivision 2, generally known as the Statute of Frauds, there was no memorandum thereof in writing signed by the party to be charged thereby or its agent. We will therefore consider this question under the heading:

C. Statute of Frauds.

(1) The Assumption Agreement Is Not Within the Statute.

It is maintained by Defendants in Error that *where one has purchased property of a debtor and in consid-*

eration of the purchase has assumed a debt due to a third person, the obligation of the purchaser to the third person is not within the statute of frauds.

Cases have been cited under Points of Law, and they will not be further touched upon here, particularly since there were memoranda in writing, signed by the party to be charged thereby, or his agent.

(2) Proof of Claim and Brief Such Memoranda as Required by Statute.

Such a memorandum was the proof of claim filed in the bankruptcy proceedings by The R. R. Thompson Estate Company, and such another memorandum was the brief filed therein.

They were filed by The R. R. Thompson Estate Company, the Proofs being signed by it and the Brief being signed by its attorneys, or agents, Bauer & Green and A. H. McCurtain, and of course, while neither the proof of claim nor the brief may have said in so many words that, "We, The R. R. Thompson Estate Company, do hereby assume all the indebtedness of the Multnomah Hotel Company," yet that is the construction that they placed upon it; that the referee in the bankruptcy proceedings placed upon it, and that is the only construction which could be placed upon it, permitting them honestly to obtain and retain the dividends received in the bankruptcy matter.

It may be pertinent to quote the following language of Thayer, J., of the Supreme Court of Oregon in deciding *Fisk v. Henarie*, 13 Or. 156, 171:

"The writing in such case need not be signed by both parties, * * *. Neither is it necessary that it contain apt words of concontract." * * *

"Any language from which the terms indicated could reasonably be implied would be sufficient. * * * The substance, and not the form, will be looked at in such a case. The object and purpose of these letters should be considered. They should be construed in the light of the surrounding circumstances, and the intention of the parties be gathered from their whole contents. * * * An answer in chancery, admitting the terms of an agreement, has frequently been held to take the question out of the statute of frauds. A parol agreement in such case is not illegal, though invalid unless evidenced by a writing. But the writing need not be made at the time. A subsequent acknowledgment of the agreement by a writing signed by the party to be charged, or his authorized agent, will be sufficient. This doctrine is so well settled that authorities need not be cited to support it."

(3) Question Not Reviewable.

Counsel for Plaintiff in Error, as has already been intimated in the early part of this brief, *has not assigned* in the Assignments of Error filed with his petition for writ of error, the holding of the court that evidence of the assumption was inadmissible under Section 808, Lord's Oregon Laws, Subdivision 2, Statute of Frauds, and it is urged that counsel should not now be permitted to take advantage of this position, although, as intimated, clearly this question seems immaterial, since in any phase of the matter, clearly the evidence was admissible.

Let us now clear up certain other debris which appears in the Brief of Plaintiff of Error, and which has no place therein, since the questions suggested are not properly reviewable.

(D) Other Questions Not Reviewable.

Those Specifications of error set forth in the Brief of Plaintiff in Error (pp. 14, 15, Brief) which correspond with the Assignments of Error (Transcript, p. 54-57) are as follows:

The *First* Specification corresponds in part with Assignment of Error I, namely, in that it assigns as error the holding by the court that the complaint stated facts sufficient to constitute a cause of action.

It is set forth in the Brief (and this is the only discussion thereof in the Brief) in substantiation of the claim that the Complaint does not state a cause of action, as follows (Brief, p. 16):

> "It appears from the complaint that the agreed consideration to be paid by plaintiff in error to I. Gevurtz & Sons was $175,000. It further appears from the complaint that the plaintiff in error actually paid, or assumed debts in excess of said sum. Such agreement was void as to the excess of $175,000, for two reasons, namely, for want of consideration, and because the undertaking to assume debts in excess of $175,000 was void, because no memorandum of the same was signed by the plaintiff in error, the party to be charged."

No discussion of this Assignment is necessary, and

none will be attempted, except to call the attention of the court to the fact that the complaint does not anywhere state that there was no memorandum of said agreement of assumption in writing, nor does it so appear therefrom. In fact it does appear in the complaint that in addition to the $175,000 to be paid as consideration for the capital stock by The R. R. Thompson Estate Company there was a further consideration to assume the debts in excess of that amount, and moreover the second cause of action set forth in the complaint specifically states that the Multnomah Hotel Company did not owe debts in excess of $175,000.

The *Second* Specification of Error is to the effect that there was error "in the holding by the court that the evidence introduced and received was admissible under Section 808, Lord's Oregon Laws (Subdivision 2)," Statute of Frauds.

There is no such assignment of error, consequently under rules 11 and 24, heretofore referred to, such error not assigned, according to these rules, should not be regarded.

The *Third* Specification of Error is that the court erred in holding "that the evidence introduced and received proved or tended to prove the material allegations of the complaint." There is no such Assignment of Error, unless Assignments of Error II, III, IV, V, VI, VII, VIII and IX, involving the admission of various exhibits, be considered to correspond with that specification.

No reason is given in the specification why error was committed in admitting these exhibits, and it is hard to conceive of adequate reasons that could be given.

However, it is not the province of this court, nor is it the duty of counsel for Defendants in Error to guess possible reasons for *alleged* error, and attention of the court is again respectfully called to Points of Law VI, where is cited the case of *Deering Harvester Co. v. Kelly* (C. C. A., 6th Cir.), 103 Fed, 262 and *Migeon v. Montana C. R. Co.* (C. C. A., 9th Cir.), 77 Fed. 249, 252, the latter of which cases holds that, when a specification of error as to the rejection of evidence states only the subject of the evidence, and does not give its substance and the brief contains no reference to the page of the record showing the ruling as required by rule 24 of the Circuit Court of Appeals for the Ninth Circuit (none is shown in Brief of Plaintiff in Error here), the matter is not properly brought to the attention of the court.

This Court, after quoting rule 24, comments thereon as follows:

> "A strict compliance with these provisions would not only be of great advantage to counsel in their arguments, but would materially aid the court and lessen its labors. It is the duty of an appellant to particularly point out the alleged error upon which he relies, and to directly refer the court to the page of the transcript where the alleged erroneous ruling of the court is to be found."

Attention of the Court in this regard is also called to the opinion of the Court in the case of *Sigafus v. Porter,* 84 Fed. 43.

The *Fourth, Fifth* and *Sixth* Specifications of Error and Assignments of Error X, XI and XII correspond, and are to the effect that the court erred in its refusal

to make special findings of fact and conclusions of law. There is no discussion of this phase of the case in the Brief of Plaintiff in Error, and it is assumed that the contention is abandoned. However, we respectfully refer to the statement of the law and authorities cited under Point of Law I. In reference to this subject, the attention of the court is called to the case of *School District No. 11 v. Chapman* (C. C. A., 8th Cir.), 152 Fed. 887, 894, a writ of certiorari in said case being denied by the Supreme Court, *205 U. S. 545; 51 L. Ed. 923; 27 Sup. Ct. 792.* The Court said:

> "The trial was to the court, without the intervention of a jury, pursuant to a stipulation in writing filed with the clerk, and the finding upon the issues of fact was general. A proposed special finding tendered by the defendant was not adopted, and this is in effect made the subject of review. When the trial is to the court, without the intervention of a jury, whether the finding shall be general or special rests in the discretion of the court in like manner as it rests in its discretion, when the trial is with a jury, to require that the verdict be general or special. The statute (Rev. St. U. S. sec. 649 (U. S. Comp. Stat. 1901, p. 525)) declares that the finding 'may be either general or special,' but it does not give to one of the litigants the right to determine which it shall be."

The *Seventh* Specification of Error is to the effect that the court erred in holding "that there was sufficient evidence to support the complaint, or a judgment." This specification corresponds with Assignment of Error XIII, and it is under this specification that the questions of law are discussed in this brief and in the Brief of Plaintiff in Error.

There is no Specification of Error in the Brief corresponding with Assignment of Error XIV, which assignment is "that the court erred in not entering judgment for the defendant and against the plaintiff." In addition to the fact that this Assignment is not specified as error in the Brief, the attention of the court is called to the law set forth under Point of Law V and to the case of *Deering Harvester Co. v. Kelly* (C. C. A., 6th Cir.), 103 Fed. 261, already quoted from in the beginning of this brief.

(E) Discussion of Authorities Relied Upon in Brief of Plaintiff in Error.

This now brings us to the discussion of authorities cited and discussed by Plaintiff in Error in its Brief.

Those authorities cited on pages 17 to 19 to the effect that no written memoranda of the assumption was introduced, and that such written memoranda of the assumption was requisite under the statute of frauds before Plaintiff in Error could be held liable under the assumption, if made, will not be noticed here in view of the fact that *none of the cases cited by Plaintiff in Error maintain its contention,* and further since this phase of the matter has already been discussed in full under the head herein of Statute of Frauds.

Authorities cited on page 21 of the Brief of Plaintiff in Error and discussed at length on pages 22 to 34, are to the effect that a third person may not maintain an action upon a contract made by two others, the performance of which will inure to his benefit, but to which he is not a party.

Much reliance is placed by Plaintiff in Error upon the case of *National Bank v. Grand Lodge,* 98 U. S. 123 (Brief, pp. 24-25). In that case it was held that the Grand Lodge, by resolution made a proposition to the Masonic Hall Association, which resolution when accepted "constituted at most only an *executory contract inter partes,*" and that "even as between the Association and the Grand Lodge the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. * * Certainly the obligation of the Lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the Hall Association to deliver it. If they can sue upon the contract and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the Lodge is compelled to pay, whether it gets the stock or not." It will be seen therefore that the agreement in this case was executory. The Supreme Court, in the preliminary discussion of the phase, suggested certain rules of law with regard to a suit by a party upon a contract to which it was not privy.

That the contract there was executory is stated pointedly in the case of *Pope v. Porter* (U. S. Cir. Ct. Iowa), 33 Fed. 7, 9, opinion by Shiras, J., where it is said:

> "In the other case cited (Bank v. Grand Lodge, 98 U. S. 123) it was held that the promise made by defendant was concurrent with and dependent upon the contract of the other party, and, being an *executory contract*

> [italics ours] between the immediate parties thereto, a third party could not sue thereon, without, in effect, changing the meaning of the contract."

This distinction is also clearly made in the case of *In re Halstead Co.*, 204 Fed. 115, 118, where it is said:

> "It has already been stated that this agreement was transitory, or, as styled by the Supreme Court of the United States in a somewhat similar case 'an executory contract inter partes.' National Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75."

And so in the case of *Washburn v. Investment Co.*, 26 Or. 436, 442, opinion by Judge Bean (now a member of the Federal Judiciary), where it is said:

> "After a somewhat exhaustive examinatoin of the question we have found no case which has gone so far as to hold that such an action may be maintained on an *executory contract,*" [italics ours]

quoting *Second National Bank v. Grand Lodge,* 98 U. S. 123. In the case of *Washburn v. Investment Co.*, 26 Or. 436, the court, on pp. 443 and 444, refers to the contract there in question as follows:

> *"It was, in effect, an agreement by the defendant to advance to the leather company money with which to pay its debts, and take in satisfaction thereof its stock.* If such a contract can be enforced by the plaintiff, then every contract by which one person promises or agrees with another, for a consideration

> moving from him, to advance money to pay his debts, can be enforced by the parties whose debts were thus to be paid. We do not understand any case to have gone to that extent. If the capital stock referred to in the contract *had been in fact sold and transferred* to the defendant, and in part consideration therefor it had agreed and promised to pay plaintiff's claim against the leather company, the case would have been within the principle of *Baker* v. *Eglin* and similar cases, as we understand it." [Italics ours.]

The latter language of Judge Bean in that case to the effect that *if the capital stock had been in fact sold and transferred* to the defendant, an action could have been maintained, differentiates the Washburn case and the Grand Lodge from the case at bar. *Here the stock and assets were transferred and delivered,* and the contract was executed.

For some reason or other Plaintiff in Error refuses to see this distinction.

A similar distinction is made in the case of *Brower Lbr. Co. v. Miller,* 28 Or. 565, 572, opinion by Wolverton, J. (then a member of the Oregon Supreme Court and the learned judge below who decided the case at bar). The court there said, on page 572 of its opinion, *"The contract with the city is executory in its nature."*

And so in the opinion by Judge Wolverton in the case at bar the same distinction is made. Said Judge Wolverton, in rendering the opinion in this case (Transcript, pp. 33, 36-37):

> "It is very true, as counsel for defendant contends, that where there is only an executory

contract entered into between two parties, whereby one of the parties for a consideration moving from the other agrees to pay the debt of a third, the third party has no right of action against the promisor. Washburn v. Investment Company, 26 Or. 436; Brower Lumber Co. v. Miller, 28 Or. 565.

"But it is settled law now in this state that, where a person has received from another some fund, property or thing, in consideration of which he has made a promise or entered into an undertaking with such other, but primarily and directly for the benefit of a third, such third party may maintain an action directly upon such promise or undertaking so made and entered into for his benefit, although not a party to the transaction.

" 'In such case,' as was said in Feldman v. McGuire, 34 Or. 309, 'the third party acquires an equitable interest in the property, fund, or thing; and the law, acting upon the relationship of the parties and their treatment of the fund, establishes the requisite privity, creates a duty, and implies a promise which will support the action.'

"The doctrine has been treated of as well in the two cases first above cited, and in Parker v. Jeffery, 26 Or. 186, and Kiernan v. Kratz, 42 Or. 474, and there has been no modification of it that I am aware of in recent years.

"Applying the principle here, there was in legal intendment a fund created and left in the hands of the defendant company for the payment of all the liabilities of the Hotel Company, and for that reason the defendant company was rendered liable directly to all the creditors of the Hotel Company, including the plaintiffs."

Adverting again to the case of *National Bank v. Grand Lodge,* 98 U. S. 123, the interpretation placed by the courts upon the observations made by the Supreme Court in that case is to the effect that, if the state law gave a right of action at law to a third party for whose benefit a contract was made by two others, then the third party could sue thereon, but if in the state where the cause arose a suit was maintainable only in equity, an action at law could not be instituted, but the suit would have to be in equity in the name of the party who made the contract, the reason being that if privity be lacking, the proceeding must be in equity, unless the laws of the state give the right to sue at law. See *Everett v. Independent School Dist.,* 109 Fed. 677, 701. Such is the interpretation given that case in the cases of *Keller v. Ashford,* 33 L. Ed. 667, 133 U. S. 610; *Willard v. Wood,* 34 L. Ed. 211, 133 U. S. 309; *Johns v. Wilson,* 180 U. S. 446, 21 Sup. Ct. 445; *Jessup v. Illinois C. Ry.,* 43 Fed. 489, 493, opinion by Mr. Justice Harlan; *Everett v. Independent School Dist.,* 109 Fed. 697, 701; *Fairfield v. Rural Independent School Dist.,* 111 Fed. 108, 110; *Goodyear Shoe Co. v. Dancel,* 119 Fed. 692, 695; *Central Elec. Co. v. Sprague,* 120 Fed. 925, 926; *Barker v. Pullman Car Co.,* 124 Fed. 555, 566-8; *Quigley v. Spencer Stone Co.* (C. C. A. 7th Cir.), 143 Fed. 86, 90; *Gray v. Grand Trunk West. Ry. Co.,* 156 Fed. 736, 741-5; *Gibson v. Victor Talking Machine Co.,* 232 Fed. 225, 228.

This distinction is also set forth in the case of *Union Mutual Ins. Co. v. Hanford,* 143 U. S. 187, 36 L. Ed. 118, decision by Mr. Justice Gray, although in that case the Grand Lodge case is not cited.

The next case discussed by Plaintiff in Error (Brief, p. 25) is that of *Pennsylvania Steel Co. v. N. Y. City Railway Co.,* 198 Fed. 721, 749. The case is not really discussed, but merely quoted from, and there is certainly no objection to the quotation nor to the decision, and it is clearly in line with that contended for by the Defendants in Error, only the quotation might have been begun a few lines earlier in the decision, where it is said:

> "There is no real and substantial reason, why, if the parties to a contract recognize the interest of a third person and desire and intend to give him a right of action upon it, they should not be able to do so. And the prevailing doctrine in this country is contrary to the English rule."

Plaintiff in Error here begins quoting from the opinion, as follows:

> "It is generally held, subject to qualifications, that a third person may sue upon a promise made to another for his benefit. Sometimes the right is based by the courts upon provisions in codes giving the 'real party in interest' the right to prosecute suits. Sometimes it is based upon the theory of a trust; the promisor being regarded as trustee for the third party. Sometimes it is based upon the theory of agency; the promisee in the contract being considered the agent of the third party, who adopts his acts in suing upon the contract. But whatever may be the correct theory, one thing is essential to the right and that is that the third person be the real promisee. It is not enough that the contract may operate to his benefit. It must appear that the parties intend to recognize him as the primary party in interest and as privy to the promise."

In the case at bar, certainly the Weinhard Estate, as one of a class, to-wit, creditors of the Multnomah Hotel Company, was recognized, and was within the language of the quotation of Plaintiff in Error. The parties had in mind and intended that the creditors of the Multnomah Hotel Company should receive the benefit of the agreement between them. Not only was this true, but *The R. R. Thompson Estate Company received money in the form of dividends to which the Weinhard Estate was entitled, and it should be here added that in this case, not only was the Weinhard Estate intended to be benefited by the parties, but The R. R. Thompson Estate Company actually received a consideration, to-wit, dividends, which in fact belonged to the Weinhard Estate, and there was really and in fact actual privity between them.*

On page 27 of its brief, counsel for Plaintiff in Error refers to the note in the case of *Linneman v. Moross,* 39 Am. St. Rep. 531. We have already quoted from that note, and further attention need not be given to it.

On the same page of its brief counsel cites the case of *Davis v. Dunn,* 121 Mo. App. 493, saying, "We have found *one case* expressly holding with our contention in the case at bar."

An expression of jubilation on the part of counsel for Plaintiff in Error is lightly veiled behind those words: "Eureka! It has been found! One case has been discovered expressly in point!" exclaims counsel, as it were. But, alas! even this solace cannot be accorded to counsel for Plaintiff in Error.

The facts in that case are thus given by counsel in its brief, on page 27:

> "It was admitted that the buyer of a stock of merchandise had agreed to pay 80 per cent of the value of the said stock, and out of the purchase price to pay items of indebtedness due from the tenant (the seller), including a claim for rent; and it was held that when the buyer had paid debts of the tenant to the amount of more than the value of the goods without paying the rent, he was not liable for the rent claimed, although it was found that the promise of the buyer for the benefit of the landlord *was an unconditional promise.*" [Italics ours.]

On the contrary, the language of the court is: "Their written promise to Collins for plaintiff's benefit WAS NOT AN UNCONDITIONAL PROMISE."

For the purpose of calling the court's attention to the distortion placed by Plaintiff in Error upon that case, this opinion will now be set forth, since it is a typical treatment of the cases by Plaintiff in Error repeatedly throughout its brief.

Said the court in that case:

> "Plaintiff brought this action for rent alleged to be due him for a store building in the town of Wheeling. He prevailed in the trial court. It appears that plaintiff owned a building which he had rented to James Collins who left therein a stock of merchandise. There was due to plaintiff from Collins, as rent, the sum of $192.50 when Collins sold his stock to these defendants, the sale being evidenced by a written contract in which the defendant agreed to pay eighty per cent of the cost of the goods, furniture and fixtures (to be ascertained by an invoice) and which contained an additional provision that defendants should 'out of the proceeds and purchase price of said goods

pay' several specified items of the indebtedness owing by Collins to different persons, the last of which items was the rent for which this action is brought. The evidence showed that these defendants paid and discharged enough of Collins' debts as specified in the contract to amount to more than the goods as invoiced, and they therefore refused to pay the plaintiff.

"If we measure the liability of these defendants by the contract between them and Collins, we find there is no ground upon which plaintiff can stand to enforce payment of his rent from these defendants. Their written promise to Collins, for plaintiff's benefit, *was not an unconditional promise.* They were to pay the rent out of and as a part of the purchase price of the goods to be ascertained by invoice. They did pay the debts of Collins on such purchase price until nothing more was due thereon, and they were not liable for anything further. The case so considered is controlled by that of Raethel v. Smith, 68 Mo. 258."

Dunning v. Leavitt, 85 N. Y. 30, is next discussed by Plaintiff in Error in its brief, page 27. The facts were: The property was conveyed by grantor to grantee, who assumed to pay the mortgaged indebtedness. The title to the property was defective and the grantee was evicted by another having paramount title. The mortgagee sued the grantee on the promise to assume the mortgage made to the grantor, and the court upholds the general doctrine contended for, but says, as quoted in Brief of Plaintiff in Error:

"I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is

> made, can maintain an action to enforce the promise where the promise is void as between the promisor and promisee for fraud, or want of consideration, or failure of consideration."

In other words, there was no consideration moving from the grantor to the grantee. There was no valid contract between the original parties based on a consideration, upon which a third party could sue.

On page 28 of its Brief, Plaintiff in Error discussing the case of *First Bank of Sing Sing v. Chalmers,* 39 Hun. 475, says, "The defendant had taken over from his debtor a stock of merchandise in payment of his account, and had promised to pay certain claims owed by his debtor to third parties, including the plaintiff," and then quotes from the case.

As a matter of fact, *the defendant did not take over from his debtor a stock of merchandise, or any other property.* The court, in its opinion, definitely states as follows:

> "They (defendants) received nothing from Spruce & Leary (debtors). They neither obtained possession nor obtained title to any property from Spruce & Leary for which they were under obligation to pay them, or in any manner which created the relation of debtor and creditor between them. They never owed Spruce & Leary any money for anything. Of course the purchase of manufactured goods is excluded from this view; what is intended is that the defendants neither *at the time of the execution of the confession of judgment, nor at any subsequent time, received property from Spruce & Leary for which they were bound to pay as between them."* (Italics ours.)

The facts of this case, as stated by Plaintiff in Error, are not the facts, and the language quoted by them is highly misleading, to say the least, as is clearly shown by the extract above given.

The next case discussed by Plaintiff in Error in its Brief, p. 28, is the case of *Jefferson v. Asch et als.*, 53 Minn. 447, with which case we have no quarrel. The facts were as follows: George Benz was the lessor of certain property to Smith & Company. Smith & Company entered into a contract with a contractor to make certain alterations and repairs, and the contractor as principal and Asch and another as sureties gave a bond to pay all just claims for all work and material, etc. The plaintiff, having furnished materials to the contractor, brought this action on the bond against Asch, the contractor and the other obligor. The court said (p. 449):

> "As, so far as it appears by the complaint, Benz (the promisee) could not be liable to pay for the work done and materials furnished in fulfilling the contract to repair, and as, under the law then in force, his interests in the property could not be subject to a lien therefor, it was legally a matter of indifference to him whether the work and materials were paid for or not. He had no duty in respect to it. And the question comes to this: Where in a contract between two persons one promises the other to do something for the benefit of a stranger to the contract, and the promisee has no relation to the thing to be done nor to the stranger to be benefited, can such stranger bring an action to enforce the promise? * * *
>
> "Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are

> prepared to say that, where there is nothing but the promise, no consideration from such stranger, *and no duty or obligation to him on the part of the promisee*, he cannot sue upon it. Such is this case." (Italics ours.)

Nor have we any quarrel with the case of *Hargadine v. Swofford*, 65 Kan. 572, 70 Pac. 582. The case is not a similar case to the one at bar. We quote the head note of that decision, so the court may see the extent thereof:

> "*Assumption of Defendant—Fraudulent Inducement*—A creditor who claims the benefit of a contract made by another with the debtor, to pay the latter's debt will be bound by the equities between the contracting parties growing out of the agreement, and he cannot enforce the promise if the promisor was fraudulently induced to make it.
>
> *Rescission & Restoration*—One who refuses to be bound by an agreement which he was fraudulently induced to make, will not be required to restore anything which he did not receive as a consideration for his engagement."

The case of *Ellis v. Harrison*, 194 Mo. 269, 276, is discussed on page 29 of the Brief. The facts in this case are: Ellis Sr. and Ellis Jr., father and son, were partners, conducting a tobacco jobbing business. Ellis Sr. retired from the firm, and sold out to Ellis Jr., taking his notes for the purchase price. Subsequently Harrison became a partner with Ellis Jr. and by virtue of the partnership agreement agreed to assume the "mercantile debts" of the "jobbing business." The court said (p. 278):

> "If the parties when it (the partnership agreement of Ellis Jr., with Harrison) was made, understood and intended the expression 'mercantile debts' (as used therein) to exclude the notes in question (the subject of the action) the plaintiff, cannot enlarge its meaning for them. They were the contracting parties. It is their contract to be enforced, and plaintiff has no such relation to the subject as permits him to assert the contract different from what they mutually agreed it should be."

It will be seen, therefore, that what the court held, and all it held, was *that there was no contract to assume the particular debt.*

The case of *Raethel v. Smith,* 68 Mo. 258, is next discussed by Plaintiff in Error in its Brief (p. 29), where Plaintiff in Error says:

> "The defendant purchased a certain lot of bricks which it was believed would be sufficient to enable him to pay off two mortgages against the same. He paid a certain portion to the seller, at which time it was discovered that there were not sufficient bricks under the contract price to pay both mortgages. He paid the first mortgage, and it was held in an action brought by the second mortgagee to compel satisfaction of his claim from the transaction, that the purchaser, having in good faith responded to the extent of the fund in his hands, was not liable on his promise to pay the debt."

No comment need be made to this misstatement, except to quote the opinion of the court. Said the court:

"In May, 1875, Bollman sold the defendants a pile of bricks, which he estimated to contain 40,000 to 50,000 bricks, at $8.00 a thousand. He informed the defendants at the time that there was two mortgages on the bricks, one to Owen for $192, and the other to plaintiff for $46. It was, therefore, agreed that defendants should pay $80 to Bollman and the balance to go in payments to Owen and plaintiff on the mortgages. It turned out there was only 34,000 bricks and had there been 40,000 as estimated, the price at $8.00 per thousand would have paid off both mortgages. As it was, after paying $80 to Bollman, which was agreed to be paid in advance, the defendants paid the balance to Owen who had the first mortgage, and the plaintiff now insists on holding the defendants on the assumption that their contract was unconditionally to pay his mortgage for $46. *No such contract was proved,* and the judgment for the defendants was in our opinion correct." (Italics ours.)

The next case cited by Plaintiff in Error (Brief, p. 30) is the case of *McArthur v. Dryden*, 6 N. D. 438, 442-3. There is no such quotation in the opinion that "the statute presupposes a valid contract between the parties that rests upon a *sufficient consideration.*" Plaintiff in Error is quoting from the head notes. The court said in its opinion, to which there is no objection:

"Section 3840, above quoted ('a contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto received it') contemplates a contract resting upon a present consideration passing between the two contracting parties, and with which the third party has no connection. * * * In the case at bar, as

we have seen, Dryden never received *any* consideration to support an individual promise."

In this case it will be seen that there was never any contract to assume, because a contract must be based upon a consideration.

In the case of *Parker v. Jeffery,* 26 Or. 189, discussed by Plaintiff in Error in its Brief on page 30, the court held that a bond given by certain contractors to the city to hold the city harmless from any loss or damage, one condition of which was that if they should pay all sums of money due at the completion of the work, or for material used in, and labor performed in connection with said work, the bond should be null and void, and the court said:

"* * * Plaintiffs cannot maintain this action, because *there was no promise by Jeffery & Bays* (defendants) *to pay for labor and material used by Robertson Brothers* (plaintiff's assignor) in the performance of their contract with the city, nor was the bond taken by the city for the benefit of parties who might furnish such labor or material, but to indemnify and save it harmless from loss or damage by the failure of Roberston Brothers to perform their contract. The obligation of Jeffery & Bays is measured by the terms of their contract, * * *. The bond contains no covenant or agreement to pay the plaintiffs, or to see them paid, but only a condition, the performance of which will exonerate them from liability, and *such a condition will not be construed as a promise.*" (Italics ours.)

The case of *Washburn v. Investment Co.,* 26 Or.

436, discussed by Plaintiff in Error in its Brief (p. 31), has already been adverted to, and as has already been said, *the contract was eexcutory* and the court particularly stated that, if instead of an agreement to purchase the stock there had been an actual transfer of the capital stock, the third party could have recovered on the contract. Such a case as that predicated by the court is the case at bar.

Likewise the case of *Brower Lbr. Co. v. Miller,* 28 Or. 570, discussed by Plaintiff in Error in its Brief (p. 33), has also been heretofore discussed by us. That case, decided by District Judge Wolverton, when on the bench of the Supreme Court of Oregon, correctly follows the decision of *Parker v. Jeffery,* 26 Or. 189.

The case of *Feldman v. McGuire,* 34 Or. 309, is discussed on page 34 of the Brief of Plaintiff in Error. It also was decided by District Judge Wolverton (while a member of the Oregon Supreme Court, than whom, with his associate on the District Bench, also formerly a member of the Oregon Supreme Court, none are better qualified to pass upon the law of Oregon). That case is very similar to the case at bar in many phases. There a suit was brought by Mrs. Feldman to recover from one McGuire. It seems that Nicolai, the promisor, had conveyed to McGuire all of his real property. Mrs. Feldman obtained a judgment, and endeavored, in a former suit, to have the conveyance to McGuire set aside on the grounds of fraud, but the defense interposed by McGuire was that the property had been conveyed to him in consideration of the assumption of the debts of Nicolai, and the conveyance was held not to be fraudulent. Thereupon Mrs. Feldman brought a suit to recover against McGuire upon the promise of Mc-

Guire to pay the debts of Nicolai, asserting that she was one of the creditors of Nicolai. McGuire denied this, and asserted that the debts which he assumed were to the extent of $30,000, and that her debt was not among them. The court admitted certain answers filed in the other suit, which tended to show that the entire debts of Nicolai did not exceed $30,000, and that therefore Mrs. Feldman's debt was not included. The statute of frauds was also pleaded in that case, as in this, although in that case there was no pretense of a written memorandum. The court held, very properly, that there was an assumption of the debts; that Mrs. Feldman, the third party, could sue upon the contract and assert that such contract was for her benefit and that it was not within the statute of frauds.

In this connection the attention of the court is called to the case of *Barker v. Pullman Car Co.*, 124 Fed. 555, 568. In that case, referring to the question as to whether the intention to benefit the third party was sufficiently in the minds of the parties to the contract, to enable the third party to sue thereon, it is said:

> "It is clear that the creditors, etc., of the Wagner Company were incidentally intended to be benefited; but it is equally clear that the benefit of the two companies was equally intended—especially the benefit of the Wagner Company—and to relieve it from the delays incident to a payment and settlement of its obligation before a transfer of the property. In fact, this is the declared purpose and object of the assumption of these liabilities. It is not so clear that the object of this clause of the agreement was the benefit of these creditors of the Wagner Company at all, or that their interests were in the minds of the contracting parties. The property of the Wagner

> Company was not transferred to secure their payment, nor did they have a lien thereon. Still their interests and their benefit must have been in the minds of the contracting parties to some extent. Do the authorities go to the extent of holding that the benefit of these creditors, etc., of the Wagner Company, must have been the sole object of the agreement, or of the clause in question? The question is not free of doubt, but this court is of the opinion that it was not necessary to name the creditors, etc., of the Wagner Company, or specify their respective claims, their nature and amount, or that the benefit of such creditors should have been the sole object of this clause of the agreement."

The court concludes that the contract was made for their benefit.

Likewise in the case of *Moore v. First Natl. Bank of Ouray*, (Col.), 88 Pac. 385; 10 L. R. A. (N. S.) 260, 263, where it is said:

> "It further charges that, in consideration for a transfer to them by the bank of all its assets, McClure and others assumed and agreed to pay all its liabilities, aggregating about the sum of $41,000. Facts are alleged in the pleading from which it necessarily follows that the note sued on is one of the liabilities of the bank, and that the individual defendants agreed to pay all its liabilities. *The complaint clearly brings the plaintiff within the class for whose use and benefit the contract was directly made.* State v. St. Louis & S. F. R. Co., 125 Mo. 596, 28 S. W. 1074; Rohman v. Gaiser, 53 Neb. 474, 73 N. W. 923; Lehow v. Simonton, 3 Colo. 346; Green v. Richardson, 4 Colo. 584; Green v. Morrison, 5 Colo. 18. The

> estimate of the sum of the liabilities at $41,000 does not limit to that sum the liabilities which the individual defendants assumed." (Italics ours.)

However, in the case at bar, the facts are stronger, far stronger, than those found in any contested case which we have been able to discover, and it is confidently asserted that, not only must the Weinhard Estate in this case be assumed to have been one of the parties intended to be benefited by the assumption agreement, but the claim that it was not is presumptuous, especially since the Plaintiff in Error has obtained money, which otherwise the Weinhard Estate should have been entitled to. *Under what possible theory could The R. R. Thompson Estate Company have filed its claim in bankruptcy and obtained dividends therein upon the indebtedness due the Weinhard Estate if they had not assumed it, and if the Weinhard Estate had not been intended to be benefited by this assumption?* The Brief of counsel for Plaintiff in Error is silent on that subject, and no such theory was advanced below.

G. Conclusion.

In conclusion it may be said that throughout this brief counsel have endeavored to dispassionately and logically present their case and to discuss the questions involved, but it is hard to view with dispassion the assumed righteous remarks of indignation of Plaintiff in Error contained in the last few pages of its brief.

Plaintiff in Error, on page 29 of its brief, states that it cannot conceive of a greater hardship than to re-

quire them to pay the claim of the Weinhard Estate, and proceeds to set forth the amount of money which it claims it lost by reason of the transaction, and intimates that if matters were allowed to remain as they were prior to the institution of this action, the Weinhard Estate would lose only the difference between $6,000 and $2,500, the amount of the note, less the payments thereon, by the Multnomah Hotel Company, whereas it has lost, so they claim, some $43,000 in the transaction.

At last, then, reduced to its final analysis, we have some theory upon which Plaintiff in Error seeks to base its contention, namely, that since it lost heavily through the transaction, others should likewise suffer loss, and therefore insists that Defendants in Error, the Weinhard Estate, have not only no legal claim against it, but no claim of a moral or equitable nature, and that the rights of Defendants in Error are *"thinner than the memories of a forgotten dream."*

It is difficult to perceive the mental attitude of Plaintiff in Error, or its counsel, or the causes which induces it, that would effect such a weakening of the moral sense, even though it be in a dream, or the memories of one.

In answer to this delirium of indignation, which seems to possess counsel (and, knowing personally the standing and integrity of counsel, we prefer to believe it is assumed), it may be said, that The R. R. Thompson Estate Company received what it bargained to receive; it agreed to pay and assume the indebtedness of the Multnomah Hotel Company, amongst which was the notes due the Weinhard Estate. On the basis of this assumption, it received money, which it could only have received upon the claim that it had purchased or as-

sumed the obligation of the Weinhard Estate against the Multnomah Hotel Company.

Sometimes it hurts to abide by the terms of a contract which may have proven disastrous; sometimes it hurts to pay a debt upon which it is felt that no sufficient benefit has been received; sometimes it hurts to take a just loss gracefully, but honest men do these things, and courts enforce such contracts.

Respectfully submitted,

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